

(11) AUG 31 1942

CHARLES ELMORE GROOM
OLEIN

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 363

S. R. BRACKIN,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS.

GEO. E. H. GOODNER,

Munsey Building,

Washington, D. C.

Counsel for Petitioner.

J. HUBERT FARMER,

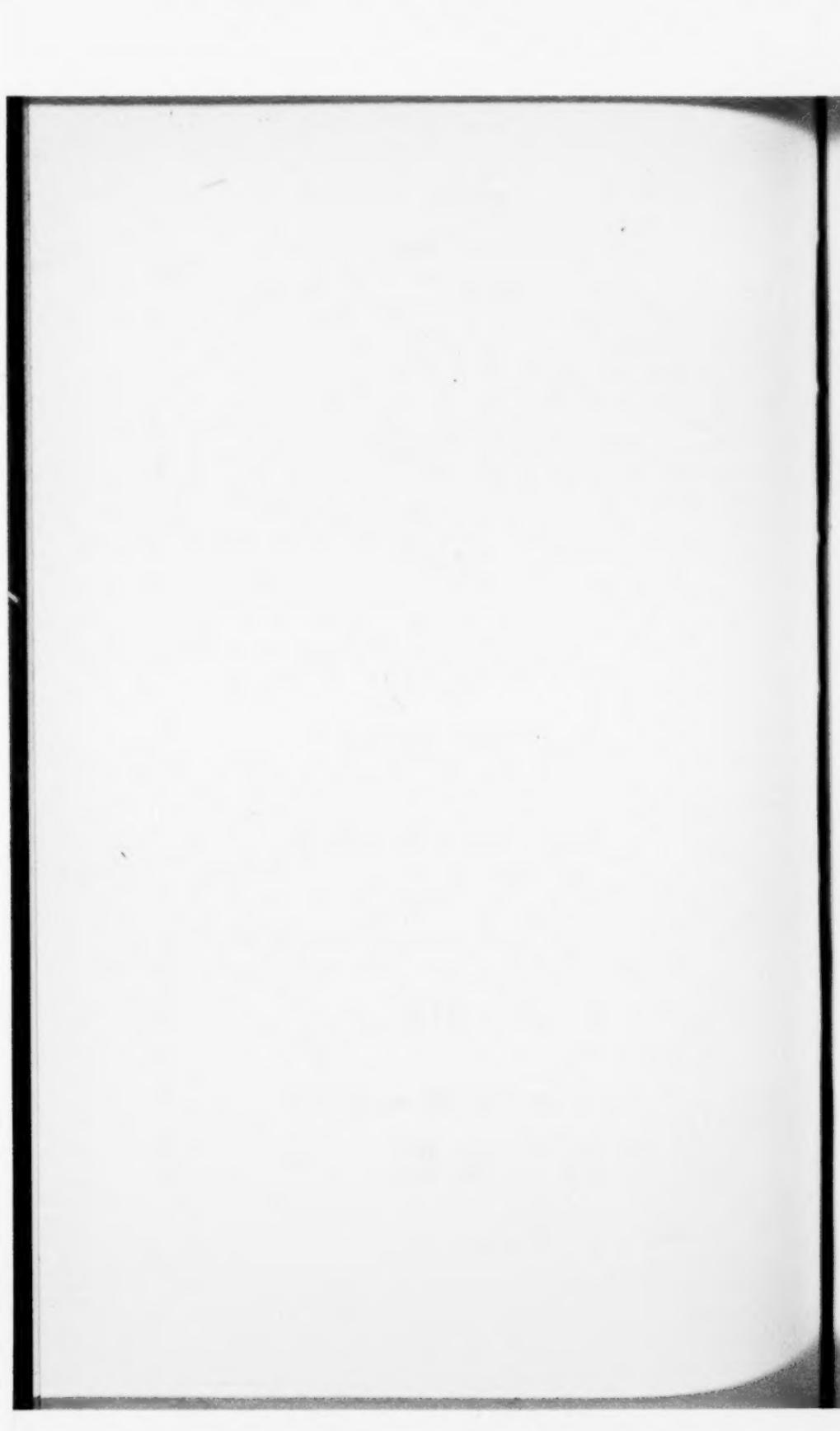
Dothan, Alabama.

SCOTT P. CRAMPTON,

Munsey Building,

Washington, D. C.

Of Counsel.



INDEX.

SUBJECT INDEX.

	Page
Petition for a writ of certiorari.....	1
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	4
Reasons for granting the writ	5
Conclusion	11
Appendix	12

CITATIONS.

Cases:

<i>Bull v. United States</i> , 295 U. S. 247	8
<i>Carriso, Inc. v. United States</i> , 106 F. (2d) 707	8
<i>City Bank Farmers' Trust Co. v. U. S.</i> , 74 F. (2d) 692	10
<i>Crain et al. v. United States</i> , 44 Fed. Supp. 321	11
<i>Dooley v. United States</i> , 182 U. S. 222	8
<i>Hvoslet v. United States</i> , 217 Fed. 680	8
<i>Mulford v. Smith</i> , 307 U. S. 38	5
<i>Sinclair Nv. Co. v. United States</i> , 32 F. (2d) 90	8
<i>Stahman v. Vidal</i> , 305 U. S. 61	5
<i>Thompson v. Deal</i> , 92 F. (2d) 478	5
<i>United States v. Butler</i> , 297 U. S. 1	5
<i>United States v. Compagnie Generale Transatlantique</i> , 26 F. (2d) 195	8
<i>United States v. Darby</i> , 312 U. S. 100	5
<i>United States v. Moor</i> , 93 F. (2d) 422	5

Statutes:

Bankhead Cotton Act, 48 Stat. 598, as amended	12
Judicial Code:	
Section 145 (28 U. S. C., Sec. 250)	2, 18
Section 151 (28 U. S. C. Sec. 257)	2, 16, 18

Miscellaneous:

	Page
23 C. J. 161, Section 19.....	10
Senate Bill 963, 76th Cong., 1st Sess.....	11
Senate Bill 1628, 77th Cong., 1st Sess.....	11
Senate Resolution 286, 76th Cong., 3rd Sess.....	11
Senate Resolution 136, 77th Cong., 1st Sess.....	11

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1942

No. 363

S. R. BRACKIN,

Petitioner,

vs.

THE UNITED STATES.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS.**

The petitioner, S. R. Brackin, prays that a writ of certiorari be issued to review the judgment of the Court of Claims entered in the above entitled cause.

Opinion Below.

The opinion of the Court of Claims was entered April 6, 1942 (R. 7), and is reported at 44 F. Supp. 327.

Jurisdiction.

The judgment of the Court of Claims was entered April 6, 1942 (R. 20). Petitioner's motion for a new trial was overruled June 1, 1942 (R. 21). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Question Presented.

Is petitioner entitled to recover from the United States a payment made by him to the United States for cotton tax exemption certificates when the surrender of such certificates (or the payment of a larger amount of tax) was required by the Bankhead Cotton Act before petitioner could market any cotton produced by him in excess of an amount allotted to him by the Secretary of Agriculture and when petitioner's money was covered into the general fund of the Treasury?

Statutes Involved.

The statutes involved are the Bankhead Cotton Act of 1934, and Sections 145 and 151 of the Judicial Code. The pertinent parts of these statutes are set out in the Appendix, *infra*, pp. 12-18.

Statement.

In 1934 Congress enacted the Bankhead Cotton Act under the terms of which there was levied a tax upon the ginning of cotton from that part of the crop which was produced and marketed by any farmer in excess of amounts allotted to him by the Secretary of Agriculture. The tax was fifty per cent of the value of the cotton, but not less than five cents per pound (R. 7-8).

Pursuant to the regulations issued under the Bankhead Cotton Act, tax exemption certificates were issued free to each cotton producer for the full amount of his individual quota. In order to market his cotton a producer was required to pay the tax levied by the Act or to deliver to the ginner tax exemption certificates covering the amount of cotton to be ginned. Upon the payment of the tax or the surrender of tax exemption certificates, the ginner issued a bale tag which permitted the producer to market his cotton in the usual way, without subjecting himself to the heavy penalties imposed for violation of the Act (R. 8, 13-14).

The law provided that the tax exemption certificates should be transferable. The Department of Agriculture anticipated that some farmers would produce more cotton than the amount allotted to them and that others would produce less. It set up pools to effectuate the transfer of certificates between farmers. The regulations provided that these certificates were transferable only through the pool or under the supervision of the county agent. In either event the county agent issued new certificates directly to the purchasing farmer at a fixed rate of approximately 4 cents per pound and dated the certificates on the date of purchase (R. 9, 11, 13).

Petitioner produced more cotton in the crop year 1935-36 than the quota allotted to him. He could market this excess cotton only by paying a tax thereon of approximately five cents per pound to the Collector of Internal Revenue, or by purchasing exemption certificates at four cents per pound, the price fixed by the Secretary of Agriculture. He chose the latter as the lesser of two evils and purchased from one of the pools tax exemption certificates in the amount of \$346.20 with which he discharged his tax liability (R. 12).

After the Bankhead Act had been held unconstitutional and had been repealed by Congress, petitioner filed with the Treasury Department a claim for refund of the amount paid for said certificates. Petitioner's claim was rejected, as a result of which the present suit was brought in the Court of Claims (R. 12-13).

Respondent filed a general traverse to the petition (R. 6). On April 6, 1942, the Court of Claims filed its Opinion in which it dismissed the petition. One Judge dissented. Another Judge concurred on the ground that petitioner had not made a showing "sufficient to overcome the presumed constitutionality of the Bankhead Act" (R. 19). Petitioner

duly filed a motion for a new trial which was overruled on June 1, 1942 (R. 20-21).

Specification of Errors to Be Urged.

The Court of Claims erred:

1. In failing to hold that the Bankhead Cotton Act was unconstitutional, null, and void.
2. In failing to find and hold that petitioner's money went into the general fund of the Treasury and that respondent had a pecuniary interest in the fund into which petitioner's money was covered.
3. In failing to hold that respondent was retaining petitioner's payment under a contract implied in fact, when such payment was made under such conditions that the parties would expect repayment when the duress of the Bankhead Cotton Act was removed.
4. In failing to find and hold that petitioner's purchase of cotton tax exemption certificates was made under such provisions of law and such regulations of the Agriculture and Treasury Departments, as to amount to duress and compulsion.
5. In failing to reopen the case and reconsider its findings, opinion, and judgment, when respondent (after judgment was rendered in its favor) was so skeptical as to the correctness of the findings that it, by motion tendered to the Court, suggested the possibility that the Court had erred in its findings of fact and opinion on a material question.
6. In holding that, if only the allotment of 10,500,000 bales of tax free cotton had been produced in 1935, no tax would have been due and that the tax was collected only on the cotton produced in excess of such total allotment.

7. In dismissing the petition when the facts of record show that petitioner has a good cause of action against the United States.

Reasons for Granting the Writ.

1. The decision below, in holding the Bankhead Cotton Act to be constitutional (R. 16), is in direct conflict with *Thompson v. Deal*, 92 F. (2d) 478 (C. A. D. C.), and *United States v. Moor*, 93 F. (2d) 422 (5 C. C. A.), holding such Act to be unconstitutional, and with *Stahmann v. Vidal*, 305 U. S. 61, and *United States v. Butler*, 297 U. S. 1, wherein the Bankhead Cotton Act was assumed to be unconstitutional. In *United States v. Moor, supra*, the Court referred to the subsequent repeal of the Bankhead Cotton Act (49 Stat. 1106, 1155) and said:

Congress thereby indicated that the Bankhead Act was so intimately related to the Agricultural Adjustment Act that the two should go down together. The two are parts of one plan. It would certainly not be fair to relieve those who had not paid the tax, and deny relief to those who had. We are content to hold that the Bankhead Act shares the fate of the Agricultural Adjustment Act.

The Court of Claims in its Opinion suggests that the foregoing cases have been overruled by *Mulford v. Smith*, 307 U. S. 38, where a tobacco program was upheld after it had been approved by two-thirds of the producers, and by *United States v. Darby*, 312 U. S. 100, upholding the Fair Labor Standards Act of 1938 on the ground that it was a valid exercise of the commerce power. These cases, however, cannot be stretched to mean that the Bankhead Cotton Act is now constitutional. The instant case is to be distinguished from the first of the above cases because the cotton growers as a group were not entitled to approve or reject the legislation as in the tobacco case. The Bank-

head Cotton Act involved herein is to be distinguished from the Acts in both of the above cases in that the Bankhead Cotton Act obviously sought to accomplish its purpose, not through the Federal power to regulate commerce, but through the Federal taxing power. Petitioner and other cotton producers had to pay a tax or purchase tax exemption certificates in order to gin their cotton, regardless of whether any or all of it stayed in the producer's county or State or entered interstate commerce.

2. While the Court stated that it was not necessary to rest the decision on the constitutionality of the Bankhead Cotton Act (R. 16), the only other basis given for the decision is the holding by the Court that petitioner's money was not covered into the general fund and thus the United States received no benefit from it.

Since the Court's Opinion was handed down the respondent has itself, in effect, admitted that the Court erred in this second basis for its decision. On August 17, 1942, respondent filed in the Court a motion "for leave to file the accompanying motion out of time", a copy of which motion and the accompanying motion was served on petitioner. Said motion was denied by the Court on the same day (R. 21). Said motion and the accompanying motion were not set forth by the lower court in the transcript of record. Because of their importance they have, therefore, been attached hereto as a part of the Appendix, pp. 21-30.

The aforesaid accompanying motion invites the attention of the Court of Claims to two letters. The second of these was written by the Acting Secretary of the Treasury in answer to certain questions propounded by the Attorney General. In his letter the Acting Secretary of the Treasury advises as follows:

All funds received by the Treasurer of the United States from whatever source are deposited and held

in a single fund commonly known as the General Fund of the Treasury. Accordingly, the moneys received from the Cotton Tax Exemption Certificate Pool of 1935 were commingled with all other funds received by the Treasurer of the United States from customs duties, internal revenue, sale of public debt obligations, and from miscellaneous sources of every kind and description. They were not segregated from other receipts of the Government. (App. pp. 27-28; italics supplied).

In discussing whether or not the United States received any benefit from the moneys deposited by the Pool in the general fund of the Treasury, The Acting Secretary of the Treasury said:

After their receipt by this Department, moneys derived from the operations of the 1935 National Surplus Cotton Tax Exemption Certificate Pool were credited to the trust fund receipt account "8530, Deposits of Miscellaneous Contributed Funds, Department of Agriculture." Under the provisions of the Permanent Appropriation Repeal Act of 1934, the amount of such funds credited to this account were appropriated and disbursed for authorized purposes and in accordance with procedures prescribed by law. (App. pp. 26-27.)

In response to another question The Acting Secretary of the Treasury stated:

After repeal of the Bankhead Act, Congress * * * could have repealed the appropriation of the amount credited to the account in question or could have reappropriated the balance therein for some other purpose. (App. p. 28.) (Italics supplied.)

The Court below found that the check given by petitioner bore certain stamps and indorsements (R. 10, 12, 15). These indicate that the money had been covered into the general fund of the Treasury. When the foregoing findings are considered along with the statements made by The Acting

Secretary of the Treasury (and filed herein by the respondent after the Court decided the case in respondent's favor), it appears that the Court erred in failing to find and hold that petitioner's money did go into the general fund of the United States and in failing to find and hold that the United States—having the right to appropriate the fund—did derive a benefit from petitioner's payment.

3. The holding of the Court of Claims that there is no legal obligation on the part of the United States to make refund to the petitioner of the payment made by him is in conflict in principle with *United States v. Compagnie Generale Transatlantique*, 26 F. (2d) 195 (2 C. C. A.), and *Sinclair Nav. Co. v. United States*, 32 F. (2d) 90 (5 C. C. A.); Cf. *Carriso, Inc. v. United States*, 106 F. (2d) 707 (9 C. C. A.); *Dooley v. United States*, 182 U. S. 222; *Hvoslet v. United States*, 217 F. 680 (S. D. N. Y.), affirmed 237 U. S. 1; and *Bull v. United States*, 295 U. S. 247; which decisions allowed recovery from the United States of amounts paid as fines, taxes, or other charges under unconstitutional statutes or taxes paid by mistake under conditions which would not in conscience permit their retention.

It is well established that a contract is implied in fact when it is made, as here, under such conditions that the parties would expect repayment when the compulsion for their actions has been removed. The Courts have repeatedly held that such payments create a contractual or quasi contractual obligation between the payor and the government.

The payment sought to be recovered herein was made by petitioner under the unconstitutional Bankhead Cotton Act, and amounted to approximately forty per cent of the value of his excess production. A tax of forty per cent is

tantamount to a fine and should be refunded just as are fines collected under unconstitutional statutes.

4. The failure of the Court of Claims to hold that the Bankhead Cotton Act exerted duress and compulsion upon petitioner is at variance with *Stahmann v. Vidal, supra*, and *Thompson v. Deal, supra*, which held that the provisions of said Act did exert duress and compulsion upon cotton producers.

5. In its brief and argument before the Court, respondent represented that the money paid into the National Cotton Pool for exemption certificates in 1935 was not covered into the Treasury of the United States as funds of the United States and that the United States did not derive any profit or benefit from the operation of such pools. The Court accepted this representation as a fact and, obviously, based its holding in the case largely upon it.

After the time had expired for filing a motion for a new trial under the Court's rules, respondent filed a motion "for leave to file the accompanying motion out of time" (R. 21; App. 21-30). On June 8, 1942, just three days after the time had expired for filing a motion for a new trial under the Court's rules, respondent wrote the letter attached to said motion as Exhibit No. 1 (App. 25). Obviously, respondent had misgivings regarding its representation to the Court before the date of that letter and in plenty of time in which to file a motion for a new trial and disclose the true facts which Exhibits No. 1 and 2 (App. 25, 26) disclose. Under such circumstances the Court of Claims should have reopened the case, still within its jurisdiction, and reconsidered it in the light of the facts as now represented by respondent.

6. The Bankhead Cotton Act by its terms applied to the 1934-1935 cotton year and, upon direction of the Secretary of Agriculture, to the 1935-1936 crop year. Under the

terms of the Act, 10,000,000 bales of cotton were to be tax free in 1934 and, by direction of the Secretary of Agriculture, 10,500,000 bales in 1935 (R. 14). The statistics of the Department of Agriculture disclose, and this Court may take judicial notice of the fact, that 9,636,000 bales were produced in 1934 and 10,638,000 in 1935. 23 C. J. 161 (Sec. 19); *City Bank Farmers' Trust Co. v. United States*, 74 F. (2d) 692. Thus, the total cotton produced in 1934 was less than the amount which was to have been produced tax free and in 1935 the excess over the amount which was to be tax free was only 138,000 bales.

In 1934 and 1935 respondent collected through its pools and deposited in the Treasury of the United States from the sale of exemption certificates the sum of \$22,423,479.94. It also collected as taxes during the two years through the Treasury Department the sum of \$1,562,097.69 (R. 11). These amounts aggregate \$23,985,577.63, collected under the taxing provisions of the Act by the United States.

The tax rate ranged from 5 to 6 cents per pound on cotton ginned when paid directly to the Collector of Internal Revenue and the exemption certificate price on excess cotton ranged from 4 to 5 cents. Assuming the maximum tax of 6 cents per pound and 500 pounds to the bale, the total tax on cotton produced in 1935 (over the 10,500,000 bales of tax free cotton), would not have exceeded \$4,140,000.00. Yet the United States collected the staggering sum of \$23,988,577.63 in taxes under the Bankhead Act.

It, therefore, appears that the Court of Claims erred, in imputing to farmers the responsibility for producing cotton in excess of their allotments, when it held that if only 10,500,000 bales had been produced and marketed in 1935, no tax would have been collected.

7. Two bills have been introduced in the Senate of the United States to refund amounts paid for cotton tax exemp-

tion certificates. S. 963, 76th Cong., 1st Sess. and S. 1628, 77th Cong., 1st Sess. The Senate referred these bills to the Court of Claims pursuant to Section 151 of the Judicial Code (28 U. S. C. Sec. 257). S. Res. 286, 76th Cong., 3d Sess. and S. Res. 136, 77th Cong., 1st Sess. That Court is sending to the Senate a copy of its decision in the instant case. On the same date that the Court of Claims handed down its opinion herein it dismissed the petition in the case of *Crain et al. v. United States*, 44 F. Supp. 321 which case involves substantially the same issues as the instant case. Petition for a writ of certiorari has already been filed in the *Crain* case (No. 199, October Term 1942).

A decision by this Court on the aforementioned legal questions would not only prevent an injustice to petitioner herein, but would also resolve the conflicts between the lower courts, and furnish desired guidance to the Senate of the United States in the report to it by the Court of Claims.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition should be granted.

GEO. E. H. GOODNER,
Munsey Building,
Washington, D. C.,
Counsel for Petitioner.

J. HUBERT FARMER,
Dothan, Alabama;
SCOTT P. CRAMPTON,
Munsey Bldg., Washington, D. C.,
Of Counsel.

August, 1942.